IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1781

[redacted], SAM HEMINGWAY, SAMUEL MELVIN McCOLLUM, JR., RUTH HEMINGWAY, CLAYTON JOSEPH, EVA JOSEPH, CHARLIE PAUL LAWSON, ALVIN HOLMES, LULA MAE HOLMES, and ROSETTA PERKINS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS A. LARKIN
Counsel of Record for Petitioners

951 Florida National Bank Building
Jacksonville, Florida 32202
(904) 358-7000

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statutes, Rules and Constitutional Provisions Involved	3
Argument	3
Reasons for Granting the Writ	71
Conclusion	73
Certificate of Service	75
Appendix A (Opinion of Court of Appeals)	77

CITATIONS

Cases:

Aquilar v. Texas, 378 U.S. 108 (1964)	41, 47
Giordenello v. United States, 357 U.S. 480 (1958)	41
Hailes v. United States, 267 A. 2d 363 (D.C.C.A. (1970)	8
House v. United States, 411 F. 2d 725 (D.C. Cir. 1969)	70
Katz v. United States, 389 U.S. 347 (1967)	12
Niro v. United States, 388 F. 2d 535 (1 Cir. 1968)	8
Sgro v. United States, 287 U.S. 206 (1932)	51, 60
Spinelli v. United States, 393 U.S. 410 (1968)	47
United States v. Davis, 461 F. 2d 1026 (3 Cir. 1972)	8
United States v. Doyle, 456 F. 2d 1246 (5 Cir. 1972)	8

United States v. Giordano, ____ U.S. ____, 945 S. Ct. 1820, 40 L. Ed 2d 341 (1974)	20, 41, 68
United States v. McCormick 502 F 2d 281 (9 Cir. 1974)	67
United States v. Mihileas, 333 F. Supp. 231 (S.D. N.Y. 1971)	70
United States v. Nichols, 89 F. Supp. 953 (W.D. Ark. 1950)	60
United States v. Pino, 431 F. 2d 1043 (2 Cir. 1970)	8, 9
United States v. Rubin, 474 F. 2d 262 (3 Cir. 1973)	7, 70
United States v. United States District Court, 407 U.S. 297 (1972)	21
United States v. Ventresca, 380 U.S. 102 (1965)	52

Statutes:

49 U.S.C. Secs. 781, 782	67
18 U.S.C. Sec. 1955(d)	67

Miscellaneous:

Rule 6(e), F. R. Crim P.	38
Rule 41, Federal Rules of Criminal Procedure	25
Constitution of the United States, Amendment IV	15, 25, 67

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

[redacted]Y, SAM HEMINGWAY, SAMUEL MELVIN McCOLLUM, JR., RUTH HEMINGWAY, CLAYTON JOSEPH, EVA JOSEPH, CHARLIE PAUL LAWSON, ALVIN HOLMES, LULA MAE HOLMES, and ROSETTA PERKINS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, SAM HEMINGWAY, SAMUEL MELVIN McCOLLUM, JR., RUTH HEMINGWAY, CLAYTON JOSEPH, EVA JOSEPH, CHARLIE PAUL LAWSON, ALVIN HOLMES, LULA

MAE HOLMES, and ROSETTA PERKINS, pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit rendered in these proceedings on April 21, 1976.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. The text of this opinion appears at Appendix A.

JURISDICTION

The judgment of the United States District Court for the Middle District of Florida was entered on April 22, 1975. Appeal was timely perfected and on April 21, 1976, the Court of Appeals rendered a decision affirming judgment of conviction of the petitioners on one count in a one count indictment that was set for trial. This petition for certiorari was filed within forty days from the date aforesaid decision pursuant to the Order of this Court, dated

May 26, 1976. The jurisdiction of this Court is invoked pursuant to Rule 37 of the Federal Rules of Criminal Procedure and 28 U.S.C. 1254.

QUESTION PRESENTED

The question presented is whether or not the standard for a nighttime search passed in the 1972 Amendment actually increased or decreased the standard for a nighttime search.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV.

Federal Rules of Criminal Procedure, Rule 41.

ARGUMENT

It is the position of the Petitioners that the Fifth Circuit Court of Appeals has taken the position that the 1972 Amendment actually lessened the requirements and

standards for a nighttime search.

It is Petitioners' position that the 1972 Amendment actually increased the standard for a nighttime search.

Prior to 1972, Rule 41 permitted a nighttime search where the affiant could demonstrate positively that the property to be seized was on the premises to be searched.

Interestingly enough, no other showing was required, other than the averment that the property was positively on the premises. Indeed, even if all the facts in the affadavit demonstrated that the property would be in the same place for a year without any danger of being moved or destroyed, a nighttime search was permissible so long as the standard of positivity was met.

This is no longer the case under the 1972 amendment.

Regardless of whether the affiant shows positively, probably, or reasonably that the property to be seized is on the premises to be searched, the affiant must now also show "reasonable cause" in order for the magistrate to authorize a nighttime search.

This is manifest from the new wording of the rule. First, the affiant must satisfy the magistrate that probable cause for the issuance of such a warrant exists.

Second, to obtain authority for a nighttime search, the affiant must also establish "reasonable cause" for such a nighttime search.

This is a more sensible approach than the per se approach that permitted nighttime searches on a showing of positivity alone.

The prior rule did not require any

showing that the evidence was in any danger of being moved or destroyed.

The 1972 amendment to Rule 41 changes the emphasis from whether or not the property is located at the premises to be searched to whether or not there is adequate justification for permitting the nighttime intrusion.

Reasonable cause is established by demonstrating an exigent need or emergency. Facts that tend to show a probability that the goods are in jeopardy of being moved to an unknown location or of being destroyed are the most likely kinds of exigent need.

What other valid factors can there be for the extreme measure of a nighttime search, other than a reasonable belief that the evidence might be lost by being moved to an unknown location or by being destroyed?

The immediate danger of loss of evidence will create the exigency for a nighttime search.

The standards of an emergency nature that are generally applicable to warrantless searches are the type of exceptional circumstances that would result in "reasonable cause shown" under the 1972 amendment to Rule 41 for a nighttime search.

An excellent discussion of situations constituting emergency circumstances in the context of warrantless searches can be found in United States v. Rubin, 474F 2d 262, 265-269 (3 Cir., 1973).

The standards set forth by the Third Circuit in that case are worthy of attention here and should be adopted as the standards for demonstrating "reasonable cause" for nighttime searches.

The Third Circuit noted the Supreme

Court cases that permitted warrantless searches in exceptional circumstances where there is the danger that the evidence will be removed or destroyed (474F 2d at 265).

The Court then stated (at p. 268):

> "When government agents, however, have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant, compare United States v. Pino, 431F. 2d 1043, 1045 (2d Cir. 1970), with Niro v. United States, 388F. 2d 535 (First Cir.

1968); (2) reasonable belief that the contraband is about to be removed, United States v. Davis, 461 F. 2d 1026, 1029-1030 (3rd Cir. 1972); Hiles v. United States 267 A. 2d 363 (D.C.C.A. 1970); (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, United States v. Pino, 431 F. 2d at 1045; (4) information indicating the possessors of the contraband are aware that the police are on their trail, United States v. Doyle, 456 F. 2d 1246 (Fifth Cir. 1972); and (5) the ready destructibility of the contraband . . .

What valid exigent circumstances were presented to the magistrate in this case that could provide "reasonable cause" to justify the nighttime intrusions?

It is respectfully submitted that there was no need or "reasonable cause shown" for the nighttime search. In fact, the contrary is true.

The apparent justification for a nighttime search is presented by the expert "testimony" of Special Agent Norman H. Ritz in his affadavit.

On Page Four (4), Agent Ritz states: "Sellers maintain these records for at least a week after the sale has been made and frequently maintain these records for several weeks or longer."

This actually negates the need for the extreme measure of a nighttime search. If the gambling records are maintained for such a long period of time, there was no danger of their imminent destruction.

It cannot be argued that the records would be lost by being moved, since, if the records were moved, they would be moved from a known location (say, of a seller) to another known location (probably, the "check-up house").

Since both locations were to be searched in this case, there is no danger of a loss to an unknown location.

At the evidentiary hearing, Special Agent Ritz testified that, although the gambling records were maintained for several weeks, he believed that a nighttime search was required in order to maximize the element of surprise and, thereby, to minimize the possible loss or destruction or records.

Special Agent Ritz was also questioned as to the reason for not conducting the searches at 7:00 a.m. in the morning in order to get the same surprise advantage.

He stated that he thought several subjects would have already left for work at that hour, but he did not state that any gambling records were taken to work with them.

The affadavit of Agent Ritz establishes that the gambling records were maintained for several weeks. There was no "reasonable cause shown" to justify the nighttime searches.

The element of surprise, the possibility of maximizing the recovery of evidence, and the convenience to the government do not constitute "reasonable cause" for a nighttime search.

Because nighttime searches are the most serious intrusion into one's residence, they must be considered to be per se unreasonable as are warrantless searches. See Katz v. United States, 389 U.S. 347, 357, (1967).

This unreasonableness can only be overcome under Rule 41 by a showing of "reasonable cause." It is of dubious logic to say that a nighttime search is justified

when the evidence shows that the records will be maintained for several weeks and where there is no allegation or suggestion of their impending loss or destruction.

On Page Four (4) of Agent Ritz' affadavit, he states that the "pick-up" men, the "check-up" house operators and the sellers maintain the records of lottery transactions for several weeks or longer.

Then, in the last paragraph, Agent Ritz states that he ....

> "....believes that proper execution of search warrants in this case must be done during the hours of darkness. This is necessitated by the fact that the 'pick-up' men do not bring the gambling paraphernalia to the 'check-up' house until the late hours of the evening, usually after 11:00 p.m."

Agent Ritz' conclusion does not follow! If the records are maintained

for several weeks, the fact that the pick-up men are operating until late hours of the evening is immaterial.

The records will still be available the next morning!

Furthermore, at best, this would only justify the nighttime search of the "check-up" house. His last sentence mentions that the nighttime search is needed because the gambling records are not brought to the "check-up" house until late in the evening.

This would not justify a search of the premises of the "pick-up" men, because they should be in the process of picking up records from sellers and, therefore, they would not be home nor have records at home.

Nor would this justify a nighttime search of the sellers who transmit the gambling records to the "pick-up" men who

carry the lottery numbers to the "check-up" house.

Indeed, even if the government conceded this point at the evidentiary hearing when it took the position that, although it may not have been necessary to search the sellers during the nighttime, it was done anyway <u>at the convenience of the government</u> under the rationale that simultaneous searches were required in order to prevent the sellers from being forewarned of the searches.

Since when did the convenience of the government outweight the Fourth Amendment rights of the people?

This gets us down to one of the very bothersome points of this whole case and the "dragnet" aspect of these searches.

Apparently, the alleged sellers are the figures of lesser importance in the

scheme of things. Are their Constitutional rights to be ignored or lessened for the convenience of the government while it conducts its nighttime searches?

This is the impression one gets from the government. It is submitted to the Court that not only must the government establish probable cause to search the sellers' premises, but also that it must show "reasonable cause" to justify a nighttime search at each and every premise.

There is no specific justification for the nighttime searches at each and every premise searched. This fact alone is sufficient to cause the Court to suppress the evidence seized in most of the searches.

If this Court does not protect the rights of the sellers, who will?

And, if their rights are diminished,

are not the rights of each person diminished?

Nighttime searches and arrests are a trademark of totalitarian and dictatorial regimes. See Senate Report Number 91-539, 91st Congress, First Sess., P. 12.

This fact is pointed out not to be dramatic, but to put this case in a historical perspective. The citizens of this country have been forewarned that the price of liberty is eternal vigilance and that the greatest enemy of liberty is the enemy within.

No one can impugn the motives of the highly dedicated and excellent work of the government personnel involved in this case. They, undoubtedly, perceived that they were only doing their jobs and that their successes in crime-fighting would benefit this country by reducing

crime.

As crime has increased, more severe measures of crime-fighting have been developed that, in some regards, are more effective in obtaining evidence for convictions.

Unfortunately, these methods pose a greater danger to individual rights. As these techniques have been used more frequently, there has been a tendency of law-enforcement personnel to take short-cuts.

While this may be symptomatic of human nature, it is no less dangerous. It is when the short-cuts have been taken that the "new crime-fighting techniques" are abused, not only to the detriment of the rights of criminals, but also to the detriment of the noncriminal public.

For example, in our determination to curb the massive danger of drug abuse

in this country, Congress passed a "no knock" law, permitting entry without knocking to obtain surprise, and, hopefully, to seize narcotics before their destruction.

In their zeal, narcotics agents burst into the homes of innocent citizens in Collinsville, Illinois, in the middle of the night in April, 1973. These agents, undoubtedly good men, dedicated to their work, made a mistake! See "New York Times," April 29, 1973, at p. 1, col. 5; "New York Times," April 30, 1973, at p. 30, col. 1.

Another example involves the use of electronic surveillance. Its purpose was laudable -- to permit an effective war on organized crime and to help preserve national security.

But, short-cuts and abuses occurred.

Such prominent men as Attorney General John N. Mitchell, Assistant Attorney General Henry Peterson and Executive Assistant to the Attorney General, Sol Lindenbaum, side-stepped the purpose of Congress for ascertaining the responsibility for authorizing wiretaps under the Wiretap Statute, with the result that a great deal of intercepted wiretap evidence was suppressed, resulting in the loss of sixty (60) cases and six hundred twenty-six (626) defendants!

In addition, the taxpayers who paid the bill saw many tax dollars wasted in lost man-hours and expenses of investigations. See United States v. Giordana, _____U.S._____, 94 S.Ct. 1820 40 L. Ed 2d 341, concurring opinion of Justice Douglas at 405 (1974).

There were also abuses involving national security wiretaps without antecedent court approval. See United States v. United States District Court, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

There were also the abuses involving "national security" wiretaps on Presidential assistants, such as Morton Halperin, of the National Security Council to see if these prominent men were "leaking" information to the press!

Now, what have we at the bar of this case? Another abuse by dedicated men who, in their zealous war on illegal lotteries, lost their perspectives.

Picture mentally the hundreds of agents posted around Live Oak and Lake City on February 13, 1974, after midnight and ready to execute search warrants.

Also, picture the forty-four (44)

defendants with their spouses and children, all in bed or asleep, when the appointed time of 12:31 a.m. came -- a time and a date that should be as infamous as the April, 1973, date in Collinsville, Illinois.

The agents' knocks awaken the occupants, announce their identity and purpose, and enter to conduct the search.

One can imagine the fright and confusion that seized the occupants by these midnight raiders. Add to that the accompanying midnight arrests!

Visualize these individuals being hauled away from their homes in the middle of the night.

If the government could not wait to conduct the searches in order not to lose evidence, why couldn't it wait until the morrow to arrest these people?

There was no evidence of imminent flight. Why was this done? Were these good agents engaged in terror tactics?

Weren't the priests of the Spanish Inquisition also good men led astray by their zeal?

It is respectfully submitted to the Court that the greater intrusions of personal liberties require proportionately higher antecedent justifications.

No-knock searches, warrantless searches, electronic surveillances and nighttime searches are all critically severe intrusions of our personal liberties and they all must require strict, valid reasons before they can be utilized.

In addition, they must be used only in very narrow, circumscribed instances.

In this case, Agent Ritz testified that the amount of evidence to be seized

without the element of surprise would be diminished.

Is this not true of all searches?

Extreme measures, such as no-knock entries have been justified in other gambling operations where the records were kept on easily destructible paper, such as water-soluble (rice) paper or "flash" paper (paper that instantly destructs itself when touched by flame or a lighted cigar or cigarette.)

But, there was no evidence of any alleged gambling records in this case being kept on highly destructible paper.

If the Court should find that convenience to the government for coordinated searches and surprise in order not to lose evidence constitute "reasonable cause" for a nighttime search in this case, then the same rationale may be applied in all cases.

Then there would be no distinction applying for day or night searches. This is what must be feared for it admits further encroachments on our liberties.

It is submitted to the Court that it must find that the affidavits, particularly the affidavit of Agent Ritz, failed to establish "reasonable cause" for the conduct of the nighttime search and that, in fact, the affidavits negated the need for a nighttime search.

Therefore, the search warrant for a nighttime search was issued in violation of Rule 41 and the Fourth Amendment, and the evidence seized must be suppressed and returned.

The Fifty-four (54) page affidavit of Special Agent Ramsey ostensibly supplies the probable cause for the search and seizure warrants.

This omnibus affidavit presents a notarious example of the dangers inherent in a large dragnet search, seizure and arrest extravaganza such as this.

The first danger is the one that it presents to the United States Magistrate. In a district such as this, the United States Magistrate is often deluged by the amount of work that confronts him.

He cannot take the time that is necessary to critically scrutinize and analyze the facts alleged in such a large affidavit.

He, as everyone, must be impressed by the overwhelming amount of evidence that appears to be included in such an affidavit.

Therefore, he concludes that probable cause is contained in the affidavit, and he issues the warrants. He knows, of course, that the evidence will be suppress-

ed if the government makes a mistake and concludes that the government personnel, not wanting to lose the evidence, will properly do their job.

The second danger is the one such an affidavit presents to the small fry of the alleged gambling business. The affidavit seems to burst forth with allegations regarding the main figures of the investigation.

As one descends down the target list of suspects, the allegations become less and less probable by degree until actually no probable cause is present -- only mere unrelated allegations that are woven into the fabric of many, many pages of allegations primarily directed at the major suspects.

The magistrate, being busy and relying on the government to do its job

properly, cannot take enough time from his other duties to make an adequate critical analysis to determine if probable cause does, in fact, exist for each person and premise.

Thus, the lesser figures suffer.

The third danger such an affidavit presents to everyone is the danger that arises from the "boot-strap" or "potluck" nature of the affidavit.

The affidavit contains a heterogeneous conglomeration of information including expert testimony, informant information, telephone toll records, undercover agent purchases, rumors, common knowledge, visual surveillances, police records of arrests, motor vehicle registration information, hearsay, and conclusions.

If a piece of information is unre-

liable or conclusory, it is thrown into the pot with the hope that it can "boot-strap" its way to reliability by some sort of corroboration.

It would probably take an extensive volume to demonstrate this point adequately. As one example, on Page 39, Source Seven observed "Alvin Holmes parked ... near the residence of Dora Williams."

In and of itself, so what?!

Then, he goes on to say that "In the past," Source Seven "...observed Alvin Holmes to make lottery pickups from Dora Williams."

First, it does not say how he knows that whatever Mr. Holmes picked up from Dora Williams in the past was lottery numbers.

Second, it does not say how close Source Seven was to the transaction when

it occurred.

Third, it does not detail when he made those observations of alleged pick-ups.

Fourth, there is no direct connection made between Mr. Alvin Holmes being parked near Dora Williams' residence and a lottery pickup on January 15, 1974.

Fifth, he does not say how near Holmes was parked to Williams' residence.

Those two paragraphs contain many unrelated circumstantial statements that are unverified, unsupported, unduly conclusory, and leave much to surmise.

So does his last observation on Page 39, that he "observed Sam McCollum, Jr., leave the vicinity of Ada Dean Curry's residence in Jasper" on January 30!

He does not state what boundaries

constitute the "vicinity" of Ada Dean Curry's residence. That is left up to the surmise and conjecture of the magistrate.

For all the magistrate knows, Jasper is small enough for the entire town to constitute "the vicinity of Ada Dean Curry's residence.

In addition, even if Mr. McCollum was within a block of Ada Dean Curry's residence, Source Seven may have omitted a pertinent fact; for example, that Mr. McCollum has a sister who lives on the block from Ada Dean Curry, whom he often visits, or that he actually observed Mr. McCollum somewhere else.

The whole affidavit is a mishmash of such conjectural and conclusory devices consisting primarily of outdated and unrealiable information, none of which stands

on its own.

Without impugning the good motives of the government personnel, one gets the impression that this was all thrown together in the belief that no one would adequately analyze it.

From a distant view, it is a forbidding structure that appears invincible. But, from a close examination of its component parts, one finds that there are many structural flaws -- any of which can bring the structure tumbling down.

The following is a brief analysis of the information contained in the affidavits that allegedly comprise the probable cause upon which the warrants issued.

Hopefully, each person will get equally adequate consideration by the Court.

CASE-BY-CASE ANALYSIS

1. Petitioners Sam and Ruth

Hemingway, husband and wife.

Search warrants were issued by the United States Magistrate for the residence and the place of business (known as The Three-Spot) of Mr. and Mrs. Sam Hemingway, located at 613 Parshley Street, Live Oak, Florida. (They are adjoining structures.)

Other than the conclusory nature of the statement regarding Sam Hemingway contained in Agent Ritz' affidavit, Mr. Sam Hemingway is also mentioned in Agent Ramsey's affidavit on Pages 1, 2, 3, 5, 6, 7, 8, 9, 13, 14, 15, 18, 19, 26, 28, 29, 31, 32, 33, 34, 40, 41, 42, and 53.

Since Mrs. Ruth Hemingway apparently lived and worked with her husband during the time in question, the information regarding her can be considered as contributing to the probable cause for the search of their home and business.

Ruth Hemingway is mentioned in Agent Ramsey's affidavit on Pages 1, 5, 15, 19, 29, 32, 33 and 53.

In analyzing the information regarding Mr. Sam Hemingway, the references to him contained on Pages 1, 2, 6, 7, 8, 13, 14, 15, 26, 28, 31, 32, 33, and 53 can be disregarded immediately, since they do not refer to his activities but are used merely to identify other activities or objects, or are conclusory in nature, e.g., Page 6 contains an unsupported inference iden 'fying various persons as sellers for Sam Hemingway (unless otherwise noted, all page numbers noted below will refer to the affidavit of Agent Ramsey).

On Page 2, there is an insidious piece of information from Mr. Jack Garrett of the Florida State Beverage Department

regarding "common knowledge" alleging that Mr. Hemingway and others are involved in a gambling business that caused Agent Ramsey to institute his investigation.

The reason for Agent Ramsey commencing his investigation is immaterial. This assertion is typical of many instances of prejudicial allegations contained in the affidavit that, coupled with fifty-eight (58) pages of other kaleidoscopic tidbits, could only further confuse, rather than elucidate the pertinent information for each person and place.

Yet, they are put in the affidavit in an unrelated fashion to give the magistrate the appearance of sound factual information.

But, in reality, they are illusory and unspecific. What is "common knowledge"? Where did Mr. Garrett acquire his "common

knowledge"? What specifics does he have?

How is the magistrate to judge the reliability of "common knowledge"?

This information must be stricken from the affidavit.

On Page 5, Source One is reported to have made rather damaging allegations regarding Sam and Ruth Hemingway, but it is based on "personal knowledge" without stating specifically where and how he obtained such knowledge.

Of his "personal observations," one is left to speculate about what source one actually did observe.

The affiant is required to state the underlying facts to the magistrate, but, here, he does not say that Source One actually saw Hemingway "check up" inside the Three-Spot or that Source One was present if and when such an act took place.

These cryptic semantics provide further innuendo for the magistrate to somehow decipher. See Spinelli v. United States, 393 U.S. 410 (1968).

On Page 34, the reader is provided the rather damaging allegation that on January 22, 1974 at about 10:11 p.m., Sam Hemingway actually visited his sister at her residence for the incriminating amount of time of four minutes!

Nothing else is said. This is the type of irrelevant and immaterial tripe that is so objectionable.

In the absence of hard evidence that this visit in some way contributed to a criminal enterprise, it must be stricken and disregarded.

Pages 40 through 42 provide further example of prejudicial and misleading innuendo. These pages outline telephone

toll record information from the telephone subscribed to by Sam Hemingway.

There are some threshhold problems for the Court to consider:

1) Who subpoenaed the records?
2) To what judicial proceeding were the records subpoenaed?
3) By what authority and by what means were these records transferred from the judicial proceeding to which they were subpoenaed to Agent Ramsey?
4) If the proceeding was a Grand Jury proceeding, was there not a breach of Grand Jury secrecy and an abuse of process for these records to be turned over to Agent Ramsey? Rule 6(e) of the Federal Rules of Criminal Procedure.

5) On what date was the subpoena returnable and on what date were the records actually delivered to the judicial proceeding?

After the telephone number is identified as being subscribed to by Sam Hemingway at his residence, there is an analysis of long-distance calls. No problem with that, is there?

But, once again, there are the insidious, prejudicial, conclusory statements on each of those pages that "Sam Hemingway received" the calls!

That is a bald-faced, unsupported conclusion!

There is no witness who stated that Sam Hemingway received those calls, nor is there any evidence of a wiretap or other reliable information to identify Sam

Hemingway as a participant in those calls.

There is just the unstated assumption by the affiant that if Mr. Hemingway is the subscriber, he is the exclusive user.

How does the affiant know that it was not his wife, a relative or a friend who received those calls?

Furthermore, it is the Three-Spot that is located at 613 Parshley Street, Live Oak (See Page 3 of Agent Ramsey's affidavit.)

It may well have been a customer who received those calls, since the Three-Spot is a public place.

No one asked Mr. Hemingway if he knew who participated in those calls. Even though Mr. Hemingway was billed for them and paid for them, it is very likely that if someone else received the calls, they reimbursed him for their cost.

The affiant has no right to make the assumption that Hemingway received the calls -- that is the prerogative of the magistrate.

It is up to the affiant to provide the facts and it is up to the magistrate to draw the inferences and conclusions from those facts. Giordenello v. United States, 357 U.S. 480, 486, 78 S. Ct. 1245, 2 L Ed 2d 1503 (1958); Aquilar v. Texas, 378 U.S. 108, 112-113, 84 S. Ct. 1509, 12 L. Ed 2d 723 (1964).

Now that the extraneous and conclusory allegations regarding Hemingway have been considered, a review should be given to the most damaging allegations.

On Page 3, there are rather incriminatory allegations made against Mr. Hemingway by Mrs. Eva Joseph to Special Agent Miles on June 19, 1973.

However, this is almost eight months prior to the issuance of the warrant!

Then, six pages later, the reader learns that Source Three alleges the purchase of a lottery ticket from Mr. Hemingway at the Three-Spot in September, 1973.

Regardless of Source Three's reliability, this is still SIX MONTHS prior to the issuance of the warrant!

These juicy items are ostensibly "updated" on Page 14, where it is learned that in "early February, 1974, Source Four advised affiant that he had personally reverified through personal observation various facts relating to Charles Williams and his Lake City operation.

Then, Source Four states that "he continues to have personal knowledge" that

certain people "continue to sell numbers" for Mr. Sam Hemingway.

Although Source Four gave this information to Affiant Ramsey in early February, the reader is left without any underlying facts to determine when or how Source Four did his "reverification."

More conjecture is left for the magistrate. The same is true of the allegations regarding Mr. Hemingway on the bottom of Page 14 and the top of Page 15.

Turning to Page 18, the reader learns that at 12:15 a.m. on Wednesday, October 21, 1973, and 11:55 p.m., on Tuesday, November 20, 1974, Mr. Clayton Joseph, Jr., "Charlie Paul" and Mr. Sam Hemingway were observed by Source Five together at the Three-Spot!

He does not say where he was when

he made this observation. It is not surprising that Mr. Hemingway was there, since he is the owner of the Three-Spot.

The magistrate is left to his own imagination to draw some sort of sinister conclusions about the three being "together."

Could it not be mere coincidence that on those two occasions Mr. Joseph and "Charlie Paul" happened to be there?

After all, Live Oak is not exactly a bustling metropolis with an overabundance of establishments open past 10:00 p.m. on week nights!

In the next paragraph, Source Five expostulates from his wonderful "personal observations and personal knowledge" the conclusions that someone known as "Patrolman Charlie Paul" of the Live Oak Police Department acts as a "guard" at the Three-

Spot and makes "lottery pickups" for Mr. Hemingway.

He also states that he saw "Charlie Paul" at the Three-Spot at approximately 12:15 a.m. on Wednesday in mid-October, 1973.

This last statement sounds suspiciously similar to the observation Source Five made in the preceding paragraph regarding his Three-Spot sighting "at approximately 12:15 a.m. on Wednesday, October 21, 1973," doesn't it?

These averments, if one and the same, are misleading in the attempt to give the magistrate the impression that there were two separate observations at 12:15 a.m. on Wednesday in October, 1973.

Source Five also neglects to apprise the reader of his prior conclusions regarding a person known as "Patrolman

Charlie Paul."

If he and the other informants were so reliable, why did they not tell the affiant that the Defendant Charles Paul Lawson was, indeed, a Live Oak Patrolman and that his correct surname, reflected in the official Live Oak Police Department employment records and on the official name tag that he wore as part of his uniform, was Lawson?

There is no such person as "Patrolman Charlie Paul." Why weren't the Live Oak police records checked? Why did reliable Source Five omit the fact that the only late-night place in Live Oak for a black patrolman to get food and drink on his break was at the Three-Spot?

Does the fact that a police patrolman on duty passes by the homes of gamblers while making his rounds make him a "pickup"

man, and does the fact that he takes his break after his patrol rounds at the Three-Spot make him a guard for Mr. Hemingway?

Live Oak is not that big a city -- a patrolman making the rounds in his police car must have passed the homes of everyone in Live Oak.

The magistrate did not have facts. He had impermissible conclusions.

The same is true of Source Five's "reverifications". He told Agent Ramsey of his "reverifications" in early February, but it is left up to mere surmise and conjecture for the magistrate to determine exactly when and how he "reverified" his allegations and what details he obtained that are the basis of his "reverifications." Aquilar v. Texas, supra at 112 (1964); Spinelli v. United States, supra.

Perhaps the illusory and outdated nature of the allegations regarding Mr.

Sam Hemingway that was supposed to constitute probable cause is found in the information about his wife.

The information regarding Mrs. Hemingway is contained on Pages 1, 5 and 53, can be immediately disregarded as unbased conclusions or mere identification.

On Page 2 there is a damaging allegation that she sold lottery tickets at the Three-Spot on June 18, 1973 -- EIGHT MONTHS prior to the issuance of the warrant.

On Pages 15 and 19, there are more unspecified allegations that Ruth Hemingway remains a seller -- from the great insight of Source Five and is "personal knowledge" and "reverification."

However, Source Five does not state any facts to substantiate his "updated" information!

On Page 29, Mrs. Ruth Hemingway is observed to drive her husband's car to the Three-Spot, park outside, and enter, carrying a large white bag!

This "sinister" incident occurred only THREE MONTHS prior to the issuance of the warrant.

What the reader is not advised of is whether the large white bag was her purse or a paper sack. If it was a paper sack, the reader is not told whether or not the observer discerned groceries or not, or even whether or not the observer was close enough to make such an observation.

What about the time, 12:30 a.m.? It is not unusual to run out of such basics as cereal, eggs, bread, milk, coffee, bacon, or sweet rolls!

To realize late at night that you

need one or more of these items for breakfast; and to decide that it is preferable to purchase these items at a late-night convenience store, rather than to shop for the items early in the morning.

There is another example of this genre of misleading "corroboration" that should be disregarded which is located on Pages 32 and 33.

Note well the affiant's statement on Page 33 that the white bag "appeared to be the approximate size of a loaf of bread"! That is not very surprising, is it?

When all is evaluated and duly considered, the following conclusions must be made:

(a) There was no probable cause for the issuance of a search warrant for the residence of the Hemingways, since

the Hemingway residence is not even mentioned anywhere in Agent Ramsey's affidavit;

(b) The most incriminatory and specific information regarding the Hemingways' alleged illegal activities are allegations about incidents that occurred between THREE and EIGHT months prior to the issuance of the warrant. This is too remote in time. SGRO v. United States, 287 U.S. 206, 210-211 (1932);

(c) The information that supposedly "updates" the information is not specific as to the actual time the alleged events took place. The magistrate is only told that the sources communicated the information to the affiant in "early February";

(d) Not only is the magistrate not told when the "updated" events took place,

but he is not told what facts constituted the events with any specificity. The reader is only told of "reverifications," "personal knowledge," and "personal observations." These unfounded assertions were prescribed by the Supreme Court in United States v. Ventresca, 380 U.S. 102 (1965), and in a subsequent line of cases; and

(e) Not only is there an absence of timely probable cause for the searches of the residence and business of the Hemingways, there was also a complete absence of "reasonable cause" to justify a nighttime search.

2. Petitioners, Clayton Joseph, Jr., and Eva Joseph, husband and wife.

Mr. and Mrs. Clayton Joseph, Jr., reside at 210 Taylor Avenue in Live Oak. Their home was searched during the night of

February 13, 1974, and both were arrested.

References in the affidavit to Clayton Joseph, Jr., are found on Pages 1, 2, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 23, 27, 28, 29, 30, 31, 33, 34, 35, 36, 44, 45 and 53.

The conclusory references contained on Pages 1, 2, 5, 18, 19 and 53 need not be considered.

On Page 4 it is reported that Lula Mae Holmes refused to sell Agent Miles a lottery number for the Puerto Rican Lottery, but that he could buy one from Mr. Clayton Joseph, Jr.

However, this was EIGHT MONTHS before the warrants were issued, and there is no reason for believing the allegations of Lula Mae Holmes with regard to Mr. Joseph.

On Page 6, Source One alleges he

observed Mr. Joseph selling numbers on January 25, 1974, from his auto in Live Oak.

Although this information is specific, it does not say how far away from Mr. Joseph Source One was at the time of the alleged sale; nor how Source One knows that the transactions were, in fact, lottery sales; nor to whom Mr. Joseph made the sales.

Source One's reliability record is suspect (Pages 4 and 5). He has provided information on 25 occasions within three years that led to five fugitive arrests and eight state gambling arrests; but no convictions are mentioned!

How is one to know he is not a spiteful gossip who is willing to provide enough hearsay for an arrest, but not enough concrete evidence for convictions?

Perhaps he merely provides hearsay in order to get an informant fee. He does not pass the test of reliability.

On Page 7, Source One, again, alleges his observations and knowledge but fails to provide specific facts regarding the events he reports.

On Pages 14 and 15, we again meet Source Five's generalizations and conclusions. But, on Page 16, Source Five provides a concrete assertion that he purchased a lottery number of Clayton Joseph, Jr., at Mr. Joseph's residence six times in October, 1973, and three times in November, 1973.

However, keep in mind that this is still THREE and FOUR MONTHS prior to the issuance of the warrants.

On Pages 16 and 17, Source Five provides specific allegations of Mr.

Joseph's involvement. But it was back in November, 1973 -- THREE MONTHS remote in time.

On Pages 23, 27, 28, 29, 30, 31, 33, 34, 35 and 36, there are statements regarding visual surveillances by F.B.I. agents that encompass the period of time from December 11, 1973, through January 30, 1974.

Presumably, these surveillances corroborate the whereabouts and associations alleged by the informants.

Is this guilt by association or innuendo?

Suppose Reliable Source "X" alleged that at 8:45 a.m., Monday through Friday, a federal judge entered the Federal Courthouse carrying a brown briefcase full of money.

Not surprisingly, a visual sur-

veillance probably would corroborate the fact that about 8:45 a.m., Monday through Friday, a federal judge entered the courthouse carrying a brown briefcase.

But, that does not permit the inference that the briefcase is full of money! And, even if the briefcase contained money, there are as many legitimate reasons for the judge doing so as there are for illegal reasons.

Surveillances that corroborate neutral allegations do not change the quality of the neutral allegations merely because a "reliable" informant made the allegations.

Pages 44 and 45 deal with the telephone toll records. Here, again, we raise the same questions regarding the acquisition and use of the records as we did with the Hemingways' toll records supra.

These toll records contribute nothing to the probable cause to search the Josephs' residence.

At best, there is merely much unreliable, outdated information regarding Clayton Joseph, Jr.

Perhaps the probable cause to search their residence comes from the allegations regarding his wife, Eva, on Pages 1, 3, 5, 6, 15, 19, 20, 51 and 53.

The information on Pages 1, 5 and 53 are merely conclusory.

On Page 3, it is reported that Special Agent Miles purchased a lottery number from Eva Joseph on June 19, 1973. This is concrete, reliable evidence, but it is not timely because it is EIGHT MONTHS old!

On Page 6, there is an allegation by Source One that Eva Joseph sometimes

accompanied her husband in selling lottery numbers from the car; but Source One does not say when she was last seen with her husband.

There is also the question of Source One's reliability, which was discussed above.

On Pages 15 and 19, there are the unspecified allegations from Source Five which were discussed above.

On Page 20, Source Six alleges that on January 22, 1974, he purchased a lottery number from Eva Joseph at her residence.

On Page 51, it is reported that Special Agent Harris purchased a lottery number from Mrs. Joseph at her residence on January 22, 1974, also.

Both of these purchases on January 22 were untimely, since they occurred

TWENTY DAYS prior to the issuance of the search warrants on February 11, 1974. United States v. Nichols, 89 F. supp. 953 (D. Ark., 1950); SGRO v. United States, supra.

In sum, there are many references to Mr. and Mrs. Joseph. However, most references are innocuous, such as the surveillances, or they are generalized.

The most specific information is outdated and untimely. Not only is there an absence of probable cause, but also there is the glaring ommission of "reasonable cause" to warrant a nighttime search at the Josephs' residence.

3. Petitioners Alvin and Lula Mae Holmes, husband and wife.

Searches and seizures were also conducted at the residence of Alvin and Lula Mae Holmes, husband and wife.

Information regarding Mr. Alvin Holmes is found on Pages 7, 8, 15, 19, 30, 39 and 53; and information regarding Mrs. Lula Mae Holmes is found on Pages 4, 5, 6, 15, 17, 19, 30 and 53.

The information on Pages 5, 9, 15, 19, 30 and 53 must be disregarded as conclusory and unspecific for the reasons stated above.

On Page 7, it is reported that in August, 1973, Source Two saw a two-tone automobile "make lottery pickups."

August, 1973 was SIX MONTHS prior to the warrants!

This report is interesting for the fact that Source Two claims the car made the pickups -- not someone driving the car, or someone riding in the car!

He does not describe who was in car, nor doe he state how he knows that

lottery tickets were being picked up.

On Page 8 it is reported that the car is registered to Mr. Alvin Holmes and "is operated by him." We are not told how the agents know that Mr. Holmes operates that car.

It certainly is a logical inference that he operates his car, based on the fact that it is registered to him -- but it does not necessarily follow!

Again, no facts are supplied to the magistrate, and unsupported conclusions are made by the agents.

Another insidious instance of innuendo is located on Page 39, where Source Seven advised the affiant that on "January 15, 1974, he observed Alvin Holmes parked ... near the residence of Dora Williams" at about 10:30 p.m.

But, it does not say how near

Williams' home he was parked, nor does it say that he met with anyone.

If this isn't bad enough, in the next sentence Source Seven reports that some unspecified time in the past, he observed Mr. Holmes making lottery pickups from Dora Williams and others.

When? It is not reported.

On these paltry allegations, the government expected the magistrate to make inference upon inference upon inference to arrive at a conclusion that on the night of January 15, 1974, Mr. Alvin Holmes was making a lottery pickup merely because he was parked "near" the residence of Dora Williams!

With regard to Mrs. Holmes, on Page 4, there is the realiable but ancient EIGHT-MONTH-OLD information that she sold a lottery number to Agent Miles from her

home on June 18, 1973.

On Page 17, Source Five reports that he bought lottery numbers from Mrs. Holmes in October and November, 1973 -- THREE and FOUR MONTHS removed from the warrants.

The observation that Mrs. Holmes went to the Three-Spot on December 11, 1973, is ambiguous, untimely and contributes nothing to a determination of probable cause.

The most reliable information regarding Mr. and Mrs. Holmes is remote in time. The information proximate in time is speculative and unreliable.

Not only is there an absence of probable cause to search their residence at all, but also there is no "reasonable cause shown" to justify a nighttime search.

4. Petitioner Mrs. Rosetta Perkins.

The information regarding Mrs. Rosetta Perkins is located on Page 6, 15, 17, 19 and 53.

The averments on Pages 6, 15, 19 and 53 must be disregarded as unreliable generalizations and unfounded conclusions for the above-stated reasons.

On Page 17, it is reported that Source Five purchased lottery numbers from Mrs. Perkins at her residence on "one occasion in November, 1973" -- THREE MONTHS prior to the issuance of the warrant!

In addition to the nonexistence of timely probably cause, there is no "reasonable cause shown" for a nighttime search.

There were no warrants issued by the United States Magistrate to search and seize any motor vehicles.

Nevertheless, the F.B.I. agents seized motor vehicles from the following individuals: Sam Hemingway, Sam McCollum, Jr., (two), Clayton Joseph, Jr., Alvin Holmes.

At the evidentiary hearing on November 18, 1974, it was stipulated by the attorney for the government and the below-mentioned attorneys that the agents of the F.B.I. seized these motor vehicles after consulting with an Assistant United States Attorney and, pursuant to the forfeiture provisions of 18 U.S.C. Sec. 1955 (d), these motor vehicles were seized without first obtaining a search and seizure warrant.

The above-mentioned Petitioners whose motor vehicles were seized challenge the legality of the seizure of the vehicles without a warrant and seek their

return pursuant to Rule 41.

A similar warrantless seizure of an automobile under an analogous law -- the Contraband Seizure Act (49 U.S.C. Sec. 781, 782) was recently held to be unreasonable by the United States Court of Appeals for the Ninth Circuit in the case of United States v. McCormick, 502 F. 2d 281 (1974).

In that case, the Court delivered a thoughtful and analytical opinion regarding the warrantless seizures of vehicles under the forfeiture statutes.

The reasoning of the McCormick opinion is applicable to seizures under 18 U.S.C., Sec. 1955 (d), since the statutes use similar language.

The Fourth Amendment guaranty against unreasonable searches and seizures can only be effectively implemented by the

interposition of the neutral, detached magistrate between the police and the people.

To maintain this principle, the Supreme Court has held warrantless searches and seizures to be unreasonable, per se, unless they come within a few well-defined exceptions.

In this case, there were no exceptions to permit the warrantless seizures -- indeed, it is even doubtful whether there was probable cause at all to justify the seizures of any vehicles, even if warrants were applied for.

Accordingly, on the authority and reasoning of United States v. McCormick, supra, it is submitted that the warrantless seizures of the motor vehicles were unlawful and the vehicles must be returned.

The United States Magistrate issued the search warrants on February 11,

1974, authorizing the agents to serve the warrants and to make "the search at any time of day or night."

However, the searches were not, in fact, conducted until 12:31 a.m. on February 13, 1974.

As pointed out above, Rule 41 permits nighttime searches for "reasonable cause shown." This "reasonable cause" for a nighttime search must exist in addition to any probable cause or positivity that the objects to be seized are in the identified premises.

The only valid "reasonable cause" would consist of some sort of emergency reasons, such as the immirient removal or destruction of the evidence.

If this exigency actually existed, then the agents were duty-bound to execute the warrants immediately and not to wait

as long as they did.

As pointed out above, if no exigency existed, there was no cause for a nighttime search!

An excellent discussion of what constitutes emeregency situations or exigent circumstances can be found in United States v. Rubin, supra, at 265-270.

The face of the warrant is technically defective in permitting the search within a ten-day period.

Once the magistrate finds an emergency that requires a nighttime search, the failure to execute the warrants forthwith, in spite of Rule 41 allowing ten days, constitutes an impermissible delay. United States v. Mihileas, 333 F. Supp. 231 (S.D.N.Y. 1971): House v. United States, 411 F. 2d 725 (D. C. Cir. 1969).

Here, as in the Mihileas Case,

there was no danger or evidence of danger that the evidence would be removed to an unknown location or that it would be destroyed.

Therefore, the mere issuance of the warrant was improper, as was the subsequent delay in executing the search.

As a matter of argument, it can be fairly stated that the delay by the government in executing the warrants is, in itself, evidence that there was no danger of the loss or destruction of the records.

REASON FOR GRANTING THE WRIT

The factual situation as presented in this Petition for Writ of Certiorari to this Honorable Court raises solely one important Question to be answered by the Court and that is: whether or not it was the intent of Congress in amending Rule 41 in 1972 to restrict the government in the

application and obtaining of warrants for nighttime searches in order to protect the public citizens' constitutional rights against such nighttime searches or whether the Congress passing said amendment to Rule 41 of the United States Rules of Criminal Procedure intended to liberalize the federal government's obtaining warrants for nighttime searches and seizures thus eroding away the prior restrictions for the granting of said search warrants and putting them on a par with any other search warrant, be it day or nighttime.

It appears that the United States Third Circuit Court of Appeals has by innuendo in their recent decisions, which are cited in this petition, concluded that it was the intent of the Congress to limit and restrict the federal government in its application for nighttime search warrants.

However, on the other hand it appears from the decisions rendered in the instant case by the United States Fifth Circuit Court of Appeals that they have taken the opposite view, TO WIT: That it was the intent of Congress to liberalize the rules to be applied where the federal government sought a warrant justifying a nighttime search and seizure.

It is for that reason that the Petitioners in the instant case seek a review by this Honorable Court in the above-entitled matter in order that his Honorable Court might set forth clearly and concisely for all the United States Courts the guidelines to be used by the federal government in seeking search warrants allowing a nighttime search and seizure.

CONCLUSION

The Petitioners allege that it was

error for the United States District Court and the Fifth Circuit Court of Appeals to interpret the intent of Congress as liberalizing the rules to be applied for the application of a nighttime search warrant to the extent that it put such application on the same basis and par for an application for a search warrant during the daylight hours.

Petitioners therefore respectfully request this Honorable Court to grant this Petition for a Writ of Certiorari and in granting same set forth the rules and guidelines necessary to protect the public citizens' constitutional rights against a nighttime search and seizure unless same is absolutely necessary and is supported by sufficient facts to show that it was impossible to obtain the same evidence under a warrant allowing a day-

time search and seizure and further under the factual situation as it occurs in this case that it reverse the ruling of the District Court and the Fifth Circuit Court of Appeals and dismiss the case against the Petitioners or in the alternative grant them a new trial.

THOMAS A. LARKIN
Counsel of Record for
Petitioners

951 Florida National Bank
Building
Jacksonville, Florida 32202
(904) 358-7000

CERTIFICATE OF SERVICE

I, Thomas A. Larkin, counsel of record for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the Petition for Writ of Certiorari was mailed this 5th day of

June, 1976, to the United States Attorney for the Middle District of Florida, and to the Solicitor General, Department of Justice, Washington, D.C.

Thomas A. Larkin
951 Florida National Bank
Building
Jacksonville, Florida 32202
Counsel of Record for
Petitioners

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Ada Dean Curry, Sam Hemingway, Samuel M. McCollum, Jr., Ruth Hemingway, Clayton Joseph, Eva Joseph, Charlie Paul Lawson, Alvin Holmes, Lula Mae Holmes, and Rosetta Perkins, Defendants-Appellants.

No. 75-2148.

United States Court of Appeals, Fifth Circuit.

April 21, 1976.

By judgments of the United States District Court for the Middle District of Florida, Gerald B. Tjoflat, J., the defendants were convicted of operating illegal gambling businesses and they appealed. The Court of Appeals, Tuttle, Circuit Judge, held that evidence presented before magistrate was sufficient to constitute reasonable cause for nighttime search of residences of suspected sellers, but that as to one defendant the evidence proved only that she was a bettor and was insufficient to sustain her conviction of operating an illegal gambling business.

Conviction of one defendant reversed and the convictions of the other defendants affirmed.

1. Gaming ⇐60

Evidence presented to magistrate that the suspected sellers in the alleged illegal gambling operation delivered betting records to specific place of business after 11:00 P.M. and that search of sellers' residences necessarily had to be simultaneous with the search of place of alleged delivery of records in order to prevent word of search from spreading constituted reasonable cause for nighttime search of suspected sellers' residences. Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.

2. Searches and Seizures ⇐3.6(2), 3.8(1)

To justify a nighttime search under a warrant probable cause must be shown for issuance of warrant, but beyond that the only requirement is that there be cause for carrying on the unusual nighttime arrest or search that, upon showing made, convinces magistrate that it is reasonable. Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.

3. Gaming ⇐98(1)

Ambiguous testimony of admitted seller together with records showing notation of defendant's name established only that defendant was a bettor and was insufficient to sustain her conviction for operating illegal gambling business. 18 U.S.C.A. § 1955.

Appeals from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, TUTTLE and GEE, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal by ten defendants from a judgment of conviction on one count of violating 18 U.S.C. § 1955 by operating an illegal gambling business:

> "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1955(a).

The business must violate a state or local law, must involve at least five persons,

Synopses, Syllabi and Key Number Classification COPYRIGHT © 1976, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

and must either operate continuously for at least 30 days or have a gross revenue of $2,000 in a single day. 18 U.S.C. § 1955(b).

At approximately 12:30 A.M. on February 13, 1974, agents of the Federal Bureau of Investigation executed search warrants that had been issued by the United States Magistrate on February 11, 1974, on the residence of each of the appellants. On February 25, 1974, a one-count indictment naming each of the appellants and charging a violation of 18 U.S.C. § 1955 was returned. Each of the appellants entered a plea of "not guilty." Each also filed a motion to suppress the evidence seized in these searches. The district court ruled on these motions on February 27, 1975; on March 19, 1975 the court entered a memorandum order explaining its rulings. All appellants had complained that there was no reasonable cause for a nighttime search but the district court found that there was reasonable cause and declined to suppress the evidence on these grounds. As to three of the appellants, Ada Dean Curry, Samuel Melvin McCollum, Jr., and Rosetta Perkins, however, the court did suppress the evidence seized on the grounds that probable cause to issue the warrants as to them had not existed. The motions of six of the appellants were denied, and that of Charles Paul Lawson was held to be moot since nothing was seized as a result of the search of his residence. All ten appellants were then tried before a jury. The jury returned verdicts of guilty as to each on March 25, 1975. All appellants appeal from the verdict; six appeal from the denial of their motions to suppress.

[1] The search warrants complained of permitted their execution "any time during the day or night;" the agents, as stated above, chose to execute them at approximately 12:30 A.M. Appellants contend that this violates Fed.R.Crim.P. 41(c) which states:

> ". . . The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime."

The "reasonable cause" presented to the magistrate in this case was that the suspected sellers in the alleged illegal gambling operation delivered their betting records to appellant Sam Hemingway's place of business, the Three-Spot, after 11:00 P.M. on Tuesdays. The magistrate decided that this sufficed as reasonable cause to search late on Tuesday night or early Wednesday morning, since after that time the records could be moved or secreted. The government further pointed out that the searches of the sellers' residences necessarily had to be simultaneous with that of the Three-Spot in order to prevent word of that search from spreading, alerting the other suspects. The district court approved the magistrate's finding that this constituted "reasonable cause" for a nighttime search, and we affirm that decision.

[2] Appellants contend that the requirement that "reasonable cause" must be shown to justify a nighttime search under a warrant means that some such substantial showing be made for the need for acting on such warrant at night. Appellant would equate this requirement with the requirement for a showing of probable cause for the issuance of the warrant. Here, of course, probable cause must be shown for the issuance of the warrant, but beyond that the only requirement is that there be cause for carrying on the unusual nighttime arrest or search that, upon showing made, convinces the magistrate that it is

reasonable. Finding that the evidence before the magistrate here met this requirement, we do not consider it necessary or appropriate to attempt to delineate the precise boundaries that are covered by this language in the Rule.

[3] One appellant, Ada Dean Curry, attacks her conviction on the ground that there was insufficient evidence from which the jury could find her guilty beyond a reasonable doubt. The government relies on the testimony of an admitted seller, Nettie Jordan, the presence of Curry's name in Jordan's records, and the testimony of an expert witness, FBI agent R. P. Harker. It is to be borne in mind that the placing of a bet or "buying" a bet, is not a violation of this statute. During its direct examination of Nettie Jordan, the prosecutor established that she was a *seller* and then asked if she ever *bought* numbers from other sellers. She said that she did. She was then asked if she had ever bought from certain individuals; as to the first five names mentioned, she answered that she had. Then the following exchange occurred:

"Q. How about Ada Dean Curry?

A. Yes.

Q. You did from Ada Dean Curry?

A. She *bought* some from *me*.

Q. She bought them from you?

A. She *bought* them from *me*."

(Emphasis added).

On cross-examination, Curry's counsel questioned Nettie Jordan on her previous testimony:

"Mr. Adams: Mrs. Jordan, I think you testified that Mrs. Curry used to make bets with you? Ada Dean used to call you and make bets with you; is that correct?

Mr. Mueller: Your Honor, I do not think that is what she said.

The Court: If it is not, she can take care of herself.

The Witness: What did you say?

The Court: He wants to know whether or not Ada Dean Curry placed bets with you.

The Witness: She *got* some *from me*, but I don't know who she got them for, but gets them for herself. A lot of them sent by for things they wanted, but I don't know who for.

By Mr. Adams: You said she never *sold you* any numbers?

A: No."

(Emphasis added).

That is the sum of Nettie Jordan's testimony against Ada Dean Curry. It is, needless to say, highly ambiguous. We construe Jordan's answer to be: "No, Curry never sold me any numbers." The government argues that Ms. Jordan's testimony is sufficiently buttressed by the appearance of Curry's name, followed by notations, on Nettie Jordan's records which were put into evidence; and by the testimony of its expert witness to take her case to the jury.

The records and the expert witness' testimony were offered to establish that Curry was a *seller* by showing that the notations proved she was a seller working for Jordan, or that she accepted lay-off bets from Nettie Jordan. The expert witness, Mr. Harker, testified that a seller in an operation such as this will establish a limit on the number of bets he will accept on a particular number. Sometimes, however, the seller may exceed this limit. This could happen, according to Harker, when a seller did not want to turn down regular customers. In the event that the seller does exceed the limit, he has two choices; to simply hold the excess himself, or to sell it, in what is

called a lay-off, to another seller. Thus, the government argues that if it could establish that Ada Dean Curry took lay-off bets from Nettie Jordan, this would prove that Ada Dean Curry was a seller.

The problem with this approach is that Harker was never asked to comment on notations under Curry's name. He did state that from perusing Jordan's records he could "see that several of the sections on these pages are necessarily sellers themselves," but he did not identify the sections or the persons. The fact that Curry's name appeared in Jordan's records 25 times between August 29, 1973 and February 13, 1974, and that this was more often than any other name appeared, does not prove that she was engaged in anything more than betting, and betting is not a violation of the statute. 18 U.S.C. § 1955. Thus, we find that the evidence is insufficient to sustain the conviction of Ada Dean Curry. So far as this record goes she was nothing more than a bettor, buying bets from Ms. Jordan.

We have considered the other contentions of the remaining nine appellants and find them to be without merit. The convictions of Sam Hemingway, Samuel H. McCollum, Jr., Ruth Hemingway, Clayton Joseph, Eva Joseph, Charlie Paul Lawson, Alvin Holmes, Lula Mae Holmes, and Rosetta Perkins are AFFIRMED. The conviction of Ada Dean Curry is REVERSED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Supreme Court, U. S.
FILED
AUG 25 1976
MICHAEL RODAK, JR., CLERK

No. 75-1781

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAM HEMINGWAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1781

SAM HEMINGWAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners Sam Hemingway, Charles Paul Lawson and Samuel McCollum were sentenced to four years' imprisonment; petitioners Clayton Joseph and Alvin Holmes were sentenced to six months' imprisonment, to be followed by thirty months' and two years' probation respectively; petitioners Lula Mae Holmes, Eva Joseph, and Rosetta Perkins were sentenced to three years' probation; and petitioner Ruth Hemingway was sentenced to two years' probation. The court of appeals affirmed (Pet. App. A, pp. 77-80).

The evidence showed that petitioner Sam Hemingway, owner of the Three Spot restaurant in Live Oak, Florida, operated three numbers lotteries from June 1973 until February 13, 1974 (I Tr. 62, 92-93; II Tr. 263-264, 371,

390-392). The largest of the three, the Puerto Rican Lottery, had the same winning number as the legal lottery run by the Commonwealth of Puerto Rico. Hemingway announced the winning number in this lottery on Wednesdays (I Tr. 93-94). The evidence also showed that among the persons who helped operate this lottery or sold numbers for Hemingway were petitioners Clayton Joseph (I Tr. 93-97; II Tr. 358), Eva Joseph (I Tr. 165-167; II Tr. 390-392), Ruth Hemingway (II Tr. 386-387), Charles Paul Lawson (I Tr. 190-209; II Tr. 247, 250, 265, 416; III Tr. 426-428), Samuel McCollum (I Tr. 134-135, 189, 199, 213-220; II Tr. 239), Rosetta Perkins (I Tr. 121-124; II Tr. 294-295), and Lula Mae and Alvin Holmes (I Tr. 131-134, 214-216).

Petitioners contend (Pet. 25-65) that the affidavits submitted in support of the applications for warrants to search the Three Spot Restaurant and their respective residences did not show probable cause.[1] However, the affidavits disclosed that upon information supplied by six informants, whose reliability was shown, and corroborated by the observations of the F.B.I. agents conducting the investigation, the police had determined that petitioners Sam Hemingway, Clayton Joseph and McCollum conducted an illegal lottery from Hemingway's restaurant and that the other petitioners solicited customers for the gambling operation. The district court carefully evaluated the

[1]Petitioners failed to include this issue as a question presented, as required by Rule 23(1)(c) of the Rules of this Court, and have otherwise claimed that the sole issue presented is the question of "reasonable cause" for the nighttime execution of the warrants (Pet. 3, 71-73). In any event, petitioners Samuel McCollum and Rosetta Perkins lack standing to raise these claims because the district court granted their motions to suppress the evidence seized at their respective residences. See *Alderman* v. *United States*, 394 U.S. 165, 174. Similarly, petitioner Charles Paul Lawson lacks standing because nothing was seized at his residence.

significance and reliability of the information contained in the affidavits and properly held that there was probable cause.[2]

Petitioners also contend (Pet. 3-25) that the affidavits failed to show "reasonable cause" for the nighttime execution of the warrants, as required by Fed. R. Crim. P. 41(c), which provides, in the pertinent part, that the—

> warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.

The warrants permitted their execution "any time during the day or night" (Pet. App. A, p. 78). The F.B.I. executed them at approximately 12:30 a.m. on a Wednesday morning.

The affidavits in support of the applications for warrants stated that the various numbers runners delivered their business records for the week's sales of the Puerto Rican lottery to the Three Spot Restaurant after 11:00 p.m. on Tuesday evenings. These gambling records could have been moved easily and quickly from the Three Spot. Moreover, as the affidavits pointed out, the searches of the sellers' residences had to be conducted simultaneously with the search of the restaurant. Otherwise, the sellers would have been forewarned of the exposure of their scheme and could have destroyed records of the previous weeks' gambling operations (see Pet. 10, 13) and fled (Pet. App. A, p. 78). Thus, the courts below properly determined that the magistrate had had reasonable cause to

[2]We are lodging with the Clerk a copy of the district court's opinion and the affidavits of Special Agents Norman Ritz and Gary Ramsey, which supported the applications for all the warrants at issue.

authorize the execution of these warrants at night. Cf. *United States* v. *Harper*, 450 F. 2d 1032, 1044 (C.A. 5).[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

---

[3]Since petitioners do not allege (Pet. 65-68) that any evidence introduced at trial was derived from the warrantless seizure and search of certain of their automobiles, their contention that these vehicles were improperly seized as contraband used in the gambling operation is not properly at issue on appeal from their convictions.